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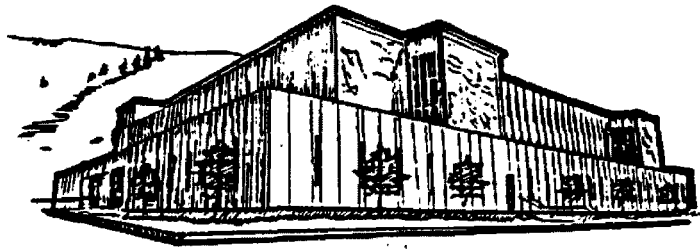
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University of
Montana

HOW MANDATORY STUDENT FEES HAVE BEEN EXPENDED AT THE
UNIVERSITY OF MONTANA BETWEEN 1985 AND 1990

BY

LYNN M. ISRAEL

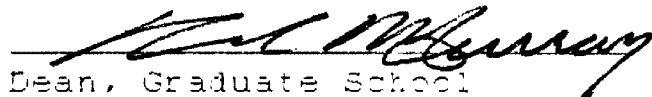
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CHAPTER I

INTRODUCTION

The specific policy area to be addressed in this paper will concern itself with the management and expenditures of mandatory student fees through a specific examination of how student computer fees at the University of Montana have been administered since their establishment as a permanent fee in 1985.

How mandatory student fees are expended should not only be a concern for all students, but it should also be of general concern to the entire university community. The analysis of the Board of Regents' management of the student computer fees actually reflects that deeper and more fundamental problem of management. Understanding how and why student computer fees were established and expended is indicative of the complex nature of the Montana Board of Regents itself. The analysis of student computer fees provides a case study that examines the distinction between adaptive planning or "muddling through."

Thus the underlying concern is whether or not student computer fees have been spent appropriately. The arguments necessary for this discussion center partially on the

definition and structure of a Board of Regent policy. The specific policy question is based on whether or not student computer fees can be spent for purposes other than for what is stated by the approved policy.

If mandatory student fees can be spent for purposes other than what they were originally collected, then this paper will address under what circumstances this is permissible. If Student Computer Fees cannot be spent for items other than what the policy says they are to be collected, then the question is whether or not the current policy should be changed. This paper will also examine how interpretation of policy can erode the original purpose for which the policy was created.

The issues related to how mandatory student fees are expended, or if student computer fees are restricted funds are important because they provide several fundamental assumptions with how the Board of Regents manages the university system. The assumption of this investigation is that administrative policy's reflect the management style of the Board.

1. If mandatory student fees are not in principle designated funds, then the policies defining such fees would appear to be inconsequential.
2. If the policies defining such fees are consequential and binding, then it is important to delineate who shall be charged with that responsibility.

3. Finally the importance of the administration of policies such as the computer user fee is rooted in the principles of public administration. Since these fees and their exemption are public funds it would follow that budgetary norms should be applied. If this is the case, then the decisions must be made to follow practices normally applied to restricted or unrestricted funds. It is critical to decide whether or not the funds are, or should be considered restricted and then abide by the guidelines for such funds.

CHAPTER II
1972 MONTANA CONSTITUTION
AND THE ESTABLISHMENT OF A NEW BOARD OF REGENTS

In order to assess the issues involved one must understand the initial context from which the Board of Regents emerged in 1972. It is important to grasp the spirit of that 1972 Montana Constitutional Convention and understand how and why the 1972 Montana Constitution created a separate Board of Regents. The conventioners did not think that the solutions they presented might be solved once and for all by the creation of two Boards under the 1972 Montana Constitution. Instead they took into account and built into that constitution a review process that would take place in 1992.

In 1972, Montana called for a Constitutional Convention and that convention resulted in a new Montana Constitution. That constitution gave the Board of Regents full responsibility and authority to run the University System. That constitution also gave the Board of Regents the power to create any other fees they deemed necessary to maintain the university system. This chapter discusses how that new constitution changed the structure of the Board of Regents. There is also discussion why the conventioners wanted a

semi-autonomous Board of Regents, as well as a brief description of the degree to which these delegates allowed the Board to be financially independent of the legislature once the legislature appropriated funds for the University System.

1972 Montana Constitution Creates Two Boards For Education

The Montana Constitution of 1972 changed the legal status of higher education in the state by creating separate Boards, one controlling higher education and the other controlling elementary and secondary education. The article: "The Structure of the Montana University System Under the New 1972 Montana Constitution" describes the difference between the two Boards. The article states that the Board of Regents was transformed from a bona fide legislative creation to a constitutional agency. This change in the Montana Constitution characterized the most significant change in the structure and control of higher education.

Under the old constitution the board of education, although a constitutional entity, nevertheless was completely dependent upon the legislature for its powers and duties. Until the legislature passed laws which implemented the constitutional mandate, the board was virtually powerless.... Under the new constitution the role of the legislature in higher education has been narrowed from one of defining all powers and duties of the board to only the functions of appropriation, audit, setting by statute the terms of office of members of the board and assigning additional educational institutions to the control of the board. The

senate has the added but exclusive function of confirming gubernatorial appointments to the board.¹

The intent of the Constitutional Convention of 1972 was to separate the powers and duties between these two boards. That separation of power between the two boards was characterized by Article X section 9 which defined the Board of Regents powers and duties with that of Article X section 9 (3) (a) which gave general supervision over the elementary and secondary public school system to the State Board of Education. In the case of elementary and secondary public schools the legislature still had the prerogative to provide other duties as well. The difference is that the legislature could not assign other duties to the Board of Regents.

Nor did the 1972 Constitution particularly place the Board of Regents under any branch of state government for its own or their administrative purposes. In fact, this general opinion was expressed in the remarks of its Chairman, Delegate Champous: "that direct legislative control under the old system had proven unworkable."²

¹ The Legal Status of the Montana University System Under the New Montana Constitution, Shaefer, 35 Mont. L. Rev. 189 (1974), p. 191-2.

² (references to the transcript of the record of the convention proceedings will be given in abbreviated form as to volume and page as follows: TR. Vol.____, P.____.) TR. Vol. VIII, p. 6268. This reference also found in The Legal Status of the Montana University System Under the New Montana Constitution, Shaefer, 35 Mont. L. Rev. 189. fn 19, p. 194.

`There was a need for autonomy and relief from state administrative bureaucracy.'"³ It is apparent from this and similar statements found in the convention transcripts that the conviction of the conventioners was to substantially change the structure of higher education in Montana. The focus of this structure, the delegates decided, was that the Board of Regents' would be solely responsible for academic, financial, and administrative concerns of the university system. Before 1972, the Legislature had played a more direct role in these areas.

Shaefer described several amendment attempts by other delegates to restrict the power of the Board of Regents. These included limiting the powers of the Board to academic matters, and giving financial and administrative powers to the state.⁴ Another amendment proposed that the Board of Regents powers be limited to administrative and academic matters and financial matters be left to the state.⁵ The rejection of these types of amendments makes it clear that the majority of the delegates at the Constitutional Convention intended that the Board of Regents be allowed to prescribe its own powers and duties.

The one limit the constitution did impose was that the Board of Regents be subjected to both legislative and

³ TR. Vol. VIII, pp. 6285-6289.

⁴ TR. Vol. IX, p. 6545.

⁵ TR. Vol. IX, p. 6532.

executive audits of their funds.⁶ In this way the legislators tried to create some accountability to the legislature. The last proposed amendment discloses the extent to which the legislators felt uneasy over the delegation of power they were unleashing, "proposing it insert the word 'accounting' before the 'audit.'" ⁷ Because the Legislature was relinquishing its power to regulate the university system there was an understandable concern that the Board, like other state departments, be incorporated under the statewide governmental accounting system. However, after considerable argument the proposal to incorporate the Board under the statewide governmental accounting system was defeated by a roll call vote of 52-40.⁸ Those who spoke in opposition to this proposal stated that it would erode and hamper the power of the board to govern itself and felt that it was up to the Board of Regents to determine the policies and procedures which would work best.⁹

While it is known what the 1972 Constitution actually adopted, the defeated amendments (also documented from the transcripts taken at the Constitutional Convention) elucidate to what extent the delegates intended the Board of

⁶ TR. Vol. IX, p. 6499.

⁷ TR. Vol. XI, p. 7868.

⁸ TR. Vol. XI, p. 7917.

⁹ Ibid., p. 197.

Regents autonomy. They intended the Board to be a quasi-independent agency (not totally autonomous) subject only to indirect legislative control. This was to consist of the Legislature having control over appropriations, audits, confirmation of gubernatorial nominations, and the Legislature assigning the Board of Regents other educational institutions for supervision.¹⁰

¹⁰ Ref. to The Legal Status of the Montana University System Under the New Montana Constitution, p.191-192, 198.

CHAPTER III

BACKGROUND HISTORY CONCERNING THE BOARD OF REGENTS AND THE COURT SYSTEM

To understand the semi-autonomous nature of the Regents, it is essential to determine how the Board conducts its operations. Therefore, a discussion of how the Board of Regents defines administrative policies, sets mandatory student fees, and compares to other states with similar administrative structures is in order. Echoing Wildavsky, whatever changes the Board of Regents produce in themselves must be the measure of their progress. Controlling the procedure, not the results, becomes what is important.¹¹

Defining Administrative Policy

A fundamental element when dealing with any administrative policy is "that any agency¹² must follow its own rules until such rules are changed prospectively¹³ or

¹¹ Wildavsky, Speaking Truth to Power/The Art and craft of Policy Analysis, ref. p. 76.

¹² "The term 'agency' includes any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense." Black law Dictionary With Pronunciations/ Fifth Edition, p. 42.

¹³ "Prospective" Looking forward; contemplating the future. Blacks Law Dictionary With Pronunciations/Fifth Edition, p. 1100.

unless the rule is merely for the convenience of the agency, and or violation of the rule leads to obtaining evidence in criminal cases."¹⁴ Gilbert Law Summaries/ Administrative Law text would say that commonly an agency such as the Montana Board of Regents can form administrative policy in several ways: by adjudication, by rulemaking, by declaratory order, or by informal agency action.¹⁵ Adjudication means the process of creating administrative policy on a case by case basis. Rulemaking means issuing prospective rules rather than deciding policy on a case by case basis. Gilbert Law Summaries state that the purpose of a declaratory order serves the same function in administrative law as a declaratory judgement in judicial litigation. This means that it permits a declaration of status, binding both the agency and the private party, to clear up troublesome disputes even though there is no existing dispute.¹⁶ A judicial review means that a declaratory order is subject to review by the courts. An informal agency action simply means that the Board of Regents can formulate a policy by informal methods.

Rulemaking emerges as the most common form by which the Board of Regents creates administrative policy. Although

¹⁴ Gilbert Law Summaries/ Administrative Law, p. III.

¹⁵ Ibid., p.14.

¹⁶ Ibid., p. 19.

the members of the Board of Regents are not confined to the Montana Procedures Act as defined under the Montana Annotated Codes as other agencies in the state, they do follow the definition of "rulemaking" in principle. This means among other things, that they ensure public participation in the rulemaking process, which allows for the possibility of producing better reasoned and responsive policy making (in principle).

In light of the broad powers given to the Board of Regents by the Montana Codes Annotated, the courts, in turn, have broadly interpreted their power to make rules as having the effect of substantive law.¹⁷

Setting Mandatory Student Fees

The 1972 Constitution gave the Board of Regents autonomy to run the university system as it deemed fit. This authority extends to prescribing designated fees when necessary. These fees can, and are, established in addition, and without respect, to the general fund revenue

¹⁷ "Substantive law:" That part of law which creates, defines, and regulates rights..." Blacks Law Dictionary With Pronunciations/Fifth Edition, p.1281 Gilbert Law Summary/Administrative Law [National Petroleum Refiners Association v.FTC, 482 F.2nd 672(D.C. Cir. 1973), cert. denied] "National Petroleum involved the power of the FTC to issue legislative rules. Although the Federal Trade Commission Act provided a general power to issue regulations, it was argued that this power only covered procedural (or interpretive) regulations. The court held that the FTC could substantively define 'unfair methods of competition' by means of its rulemaking power." p. 17.

appropriated for the University System by the legislature each biennium. Though the Board only has the authority to approve fees within the constitutional and statutory limits of state law, it also means the Board has the authority to determine the activities and purpose those fees will support.

Each of the mandatory fees set by the Board of Regents are specifically limited by their own policy as to how these fees can be expended as defined by the University of Montana catalog, or Board policy. It is generally recognized that the Board can change policies, and it is stipulated in the catalog itself that such changes can occur without notice. However, the Board has always changed those policies through regular or special meetings and the changes are reflected in writing as a revision to Board policy.

Montana Board of Regents and the Rulemaking Process

The responsibilities for creating mandatory student fees then, falls under the rulemaking process. At the University of Montana there are a variety of fees charged to students. These mandatory fees range from incidental fees which are paid by students depending on the number of credit hours taken, to specific fees which pay for a particular activity or function. The current mandatory student fees are listed below providing both a brief explanation for their establishment and the policy that defines how these fees are expended.

1. **Registration Fee:** The registration fee is a \$15.00 non-refundable fee applied to instructional costs. (Board policy 940.2 is defined by an interpretation of the intent of the policy and includes the policy's past history)
2. **Incidental Fee:** The incidental fee is a \$25.00 per credit fee applied to instructional costs.
3. **Building Fees:** At the 12 credit range, this fee is \$20.00 and is applied to the long term debt retirement accounts. (940.3, is defined by board policy and past history).
4. **Computer fee:** The computer fee is \$1.00 per credit charged to all students. This fee is applied to the costs associated with the Computer Center operations. (Board policy 940.23 is defined by adopted procedures, and past policy history).
5. **Activity Fee:** This \$20.00 fee is deposited into the accounts of the Associated Students of the University of Montana. (Board policy 940.8 adopted procedures, past policies, and an opinion by the Attorney General).
6. **Health service Fee:** Of the Health Service Fee, \$7.50 is applied to the dental program and the remaining \$41.50 is applied to general health program costs. Students who enroll for 6 credits or less have the option of waiving those fees. Note: Period of coverage for semester is exact period of time for quarter calendar.
7. **Health Insurance Fee:** The \$53.00 Health Insurance fee is used to purchase health insurance for students who do not have adequate existing health coverage. The insurance plan is specifically designed to cover costs of hospitalization and medical services.
8. **UC Operations Fees and Development Fees:** At 10 credits and more, \$38.00 is applied to the operation and development of the University Center.
9. **Out-of-State Building Fee:** This fee is \$2.00 per credit and is applied to the long term debt retirement accounts. (940.9.2&3 is defined by board policy, procedures, and past history).

10. Out-of-State Incidental Fee: This fee is \$51.00 per credit fee applied to instructional costs.¹⁸

By concentrating on one aspect of jurisdiction, that of creating and establishing mandatory student fees, it will be possible to determine how successful the Board of Regents have been in being responsible for coordinating, managing, and controlling the Montana University System. The Legislature used examples of other states to justify The Board of Regents authority and that justification has been used both by the Legislature and the Board when citizen's have challenged the Board's actions. As noted by Shaefer, that justification for autonomous action by the Board is well founded.

Regents Follow the Structure of Other States

Hugh V. Shaefer, Visiting Associate Professor of Law, University of Montana in 1972, claimed significant decisions from all fifty states reaffirm that Montana's 1972 Constitution, created a Board of Regents to be fairly autonomous and subject only to the express prescriptions contained in the Constitution itself.¹⁹ The intent of the state of Montana to follow the examples of these states is why Dr. Shaefer illustrates the autonomous nature of State

¹⁸ Definitions were extracted from the University of Montana Catalog, 1989-1990. p. 283-284.

¹⁹ Hugh V. Shaefer, The Legal Status of the Montana Board of Regents Under the New Montana Constitution ref. to Id. art.IX, p. 199.

Boards of Higher Education in California, Georgia, Louisiana, Michigan and Minnesota.

In California, the State Supreme court ruled that the legislature was precluded by the state constitution from prescribing either form or character to the Hastings College of Law because the right to prescribing form and character to a school of higher learning was the exclusive prerogative of the regents.²⁰ In a separate case, *Hamilton v. Regents* (219 Cal. 663, 28 P.2nd 355, (1934)) the California Supreme Court held:

since the board of regents of California held a constitutional grant of control, their rules and regulations have the same power as law as long as they are concerned with University Affairs.²¹

The Georgia State Constitution is similar in structure and language as that of Montana. Therefore, when the Georgia Board of Regents made the decision to operate a laundry and dry cleaning business (*Villyard et al v. Regents*. 204 Ga. 517, 50 S.E.2nd 313 (1948)), the court stated "that the powers granted to the Regents by the constitution are broad and it is necessary to look for express limitations on that power rather than authority to do specific acts."²² In Louisiana, like the State of

²⁰ *Ibid.*, p. 199.

²¹ *Ibid.*, p. 200.

²² *Ibid.*, p. 200.

Montana, the Louisiana Supreme Court ruled that the Legislature could not establish limits on parking fines because this was the exclusive prerogative of the Board of Regents.²³

Shaefer pointed out that Michigan State has also undergone reviews in the courts to define the autonomy of their Board of Regents. That autonomous authority of that Board dates as far back as 1896. The issue was resolved in the decision favoring the regents, in the case of *Sterling v. Board of Regents* (110 Mich, 369, 69 N.W. 253 (1896)). The Michigan Supreme Court ruled:

to give the legislature this power would impliedly authorize them to dismember the institution at their will.²⁴ The court reaffirmed an earlier decision which found that the board is a constitutional body charged with the entire control of the University.²⁵ The court further stated that since both the board of regents and the legislature derived their power from the same supreme authority, the legislature is not in a dominant position to the board.²⁶ To hold otherwise would reduce the board to mere ministerial officers functioning only to execute the will of the legislature.²⁷

²³ *Ibid.*, ref. p. 200. (*Board of Regents of L.S.U. v. Student Gov. Assoc. of L.S.U.*, 262 La. 849, 264 So.2d 916 (1973)).

²⁴ *Id.*, at 258.

²⁵ *Id.*, at 256.

²⁶ *Id.*, at 257.

²⁷ *Id.*, at 258; *Ibid.*, p. 201.

The Minnesota Supreme Court case of *State ex. rel. Sholes v. University* (236 Minn. 452, 54 N.W.2d 122 (1952)), perhaps holds the clearest interpretation as to why State Board of Regents have rarely if ever fallen under state administrative procedure acts. In this case, the Minnesota Supreme Court

exempted the board from state administrative procedures act on the theory that the board is something more than a mere administrative agency, its genesis being in the constitution not in the legislature as is the case with administrative agencies. As recently as 1971 the Minnesota Supreme Court passed the power of the board in *Bailey v. University of Minnesota* when it held that even the courts cannot interfere with the board as long as the board is properly exercising its own function.²⁸ Of course any improper exercise of functions can become subject to court scrutiny.²⁹

Thus it is clear that the Board of regents have clear authority to manage and control university systems. This authority brings with it a certain responsibility. It is the responsibility to manage in a reasonable and non-arbitrary manner. As with any arm of government, a Board of Regents must conduct the public affairs in a manner which assures that its constituents (in this case, students) are subject to governing rules that are fair and not easily altered to suit either party's short term self interest.

²⁸ 290 Minn. 359, 187 N.W.2d 702, (1971).

²⁹ *Id.*, at 704; *Ibid.*, p. 203.

Chapter IV

STUDENTS RIGHTS VERSUS THE BOARDS AUTHORITY

This chapter will address student attempts at challenging the Board of Regents to set mandatory student fees. Reviewing briefly these court cases will also demonstrate whether or not a Board of Regent policy has the same standing as law. Policies issued by the Board of Regents have been challenged by students partially because the Board does not fall under the Montana Administrative Procedural Act as other state agencies. Therefore, a brief discussion of that issue comes last.

Students Rights v. State or Federal Courts

The Students and The Courts, a quarterly journal, claims that administrators and officials in education often have substantial discretion as to the use of student fees. Their claim is that except in cases where administrators or officials show arbitrary or a capricious exercise of authority, the courts do not intervene. As a matter of state law, the Montana Board of Regents are not absolved of their responsibility when it comes to control and supervision of the expenditures of those funds. However, as has already been demonstrated, this control rests only in

the legislature's ability found under Article X Section 9, (d) of the Montana Constitution which states: "The funds and appropriations under the control of the Board of Regents are subject to the same audit provisions as are all other state funds."³⁰

The examples of court cases involving students versus universities or regents delineate student action concerning issues of mandatory fees. To illustrate, a case was initiated by a student from Montana State University in 1975, which involved parking fines and regulations. The student's dispute claimed the university exceeded its statutory authority in issuing tickets and doubling fines. (Montana State University v. Ransier, 536 P. 2nd 187, Supreme Court of Montana, 1975.) The court pointed out that "the legislature empowered the Board of Regents to promulgate regulations, controlling vehicles on campus and to provide a penalty for violations of those regulations. In so doing, there was no unlawful delegation of power."³¹ In the case of Haug v. Franklin, 690 S.W. 2nd 646, Court of

³⁰ The opinion of Robert L. Woodahl, Attorney General concerning University System Funding: 1. The provisions of sections 79-308 and 82A-204, R.C.M 1947, relating to the investment of state monies are applicable to the board of regents of higher education and the separate units of the Montana university system. 4. The line-item appropriations and the conditions attached thereto contained in House Bill 55, Montana Session Laws of 1973, are constitutionally permissible and binding in the board of regents of the higher education and the separate units of the Montana university system.

³¹ The College Student and the Courts, p. 1-9.

Appeals of Texas, Austin, 1985, traffic regulations were enforced to deprive David Haug, a student at the University of Texas, of a diploma because he failed to pay two parking fines. The court ruled in favor of the university because section 54.503 of the Texas Education Code, Annotated gave the Regent's the authority to assess fees for the enforcement and administration of parking or traffic violations.

This demonstrates how and why the court system upholds both the University and/or Regents' policies. Because the Montana Board of Regents has full power and authority to regulate the university system and this authority has been upheld in the Montana court system, Board policies do seem to have the same standing as law. A policy such as parking fees and parking fines becomes legal and binding on any person attending classes, working or visiting on university property. The policy has been held as legally binding each time students contest the right of the Board of Regents to issue fees, as in the example of parking fees and fines. The courts rule in favor of the university or Board of Regents because the Montana Constitution gave the Board of Regents "full power, responsibility, and authority to supervise, coordinate, manage, and control the Montana university system."³² So far the Board of Regents have only been challenged in their authority to create fees, not

³² Mont. Const. art. X section 9(2)(a), (1972).

how they manage the University System. Not one of the cases ruled on the ability of the Regents to interpret their own rules or procedures.

To determine if the Montana Board of Regents policies, once approved and issued, actually have standing as law becomes less difficult in light of Shaefer's research on the independence of state Regents and actual court cases involving students who attempted to challenge their respective Board's authority.

Although the Montana Board of Regents is not under the Administrative Procedure Act (Montana Code annotated: 2-4 102) that binds other agencies to the general accounting rules and regulations found in the Montana Statutes, Board policies still have standing as law. The difficulty with the Board of Regents not being tied to the Montana Administrative Procedure Act is that when a problem arises, interpretations of that policy may need to be clarified. Questions, or limits to authority arise, and there is very little recourse in resolving these questions except within the established system of procedures and policy the Board of Regents sets for itself.

Moreover, determining authority to set fees in this case does not automatically determine if these fees are restricted. There is no official or legal explanation to determine what a Board of Regents policy represents if the Board chooses not to follow its own policies. In other

words, what happens if the Board of Regents sets a particular mandatory student fee designated for a particular purpose, then spends those funds for something else? That problem would bring under critical review the question of what an administrative policy actually defines.

By demonstrating that mandatory student fees are restricted fees, or are, in practice, treated as such by the Board of Regents themselves, will give further credence to the claim that these administrative policies do have the power to act as law. Moreover, when the Board sets policy, then for all practical purposes the Board is as bound by that policy as is the University System.

CHAPTER V

HOW AND WHY STUDENTS MUST COMPLY WITH THE BOARD OF REGENTS POLICIES

This chapter will discuss what actions students must comply with when the Board of Regents approve and issue policies. Boards policies have definition and are enforced as law when challenged in the court system. The direction of this chapter will help define exactly how designated funds can be expended in respect to Board policy at the University of Montana. It is one thing to claim the right to establish and enforce payment for mandatory student fees, but quite another thing to determine whether or not the Board of Regents are themselves bound by their own policies once they are approved.

Therefore, this chapter will discuss whether or not the Board itself has historically treated mandatory student fees as restricted funds, how any Attorney General opinions have ruled, and finally, discuss briefly how students rights are protected under the contract of the University Teachers Union of Montana.

Defining Authority by Written Administrative Policy

In order to determine if the Montana Board of Regents treat mandatory student fees as designated funds, it should

first be determined whether mandatory student fees are given a specific label and if, in practice, the Board of Regents and university administrators treat those fees for restricted purposes.

The Montana University System Policy and Procedures Manual, Section: 940.21, under Financial Affairs, explains for example, that the Board of Regents gave the university system on January 25, 1980, the power to "withhold registration, transcripts, and diplomas from students owing debts." Since the Board of Regents created a policy on Motor vehicle registration fees, and vehicle parking fees (Section: 940.11, effective Dec. 12, 1978 and issued January 15, 1979) as well as established fines to enforce those regulations the Montana courts have upheld the universities' authority to withhold transcripts, diplomas, or deny a student the right to register. The revenue generated from both the motor vehicle registration and vehicle parking fees are designated to be used "for the development and improvement of parking lots and to strengthen the University system's security force."³³ The president of each institution can set these fees at whatever level s/he deems appropriate.

Board of Regents Policy Designated as Earmarked Funds

³³ This policy also gives a cross listing (see section 1002 for further details.

There is a significant indication as to the intentions of the Board of Regents policies in respect to students entitled: The Montana University System Policy and Procedure; Section 940.8 Student Activity Fees, which specifically state that this particular Board policy was not intended to be what the Board termed "earmarked" funds. In number 1, under board policy it states " Student activity fees...as established by prior action of the Board of Regents shall not be considered as earmarked funds in Board policy." By making an exception and specifying that student activity funds are to be differentiated (not to be considered as earmarked) from other funds, the Board of Regents affirms that any policies being approved and having both an effective date and an issued date are, in fact, designated funds. If this were not the case the Board of Regents would not have issued a policy specifying that student activity fees were not to be earmarked as other funds.

The State Attorney General gave a further opinion concerning the status of student activity fees to clarify the intent of these earmarked funds. That opinion in part states: "Mandatory university system student fees are public funds and must be expended for a public purpose determined in the first instance by the Montana Board of Regents," (Opinion #74, March 20, 1974).

**Fundamental Conclusions with Respect to How Board of
Regents Set Mandatory Student Fees**

Some fundamental conclusions emerge with respect to mandatory student fees. The Board of Regents set policy in a prescribed form. This form is by rulemaking. When the Board of Regents set policy, their authority is upheld in the courts. The Board of Regents do earmark funds for the purposes prescribed through specific policy and procedure, except those funds designated as Student Activity Fees which are expended at the discretion of the Associated Students of the University of Montana (These are still considered public funds because of the interpretation of the Attorney General).

Likewise, the Board of Regents rulemaking process when creating, or amending, mandatory student activity fees, in principle, seems to be to allow some student participation. Student participation usually occurs when "procedures" are set in place as for example:

In Section 940.9.3, Building Fees; use of, the Board of Regents have stated:

When a construction project is to be financed by the use of any new or existing building fee payable by students is planned in excess of \$200,000, an election or survey of student opinion shall be conducted by the duly constituted student government organization on the proposition. The determination of which means of ascertaining student views is to be used shall be made by the campus administration in consultation with the student government.

Before any existing building fee payable by students is increased, a similar election or survey shall be held and report made.

The history of Building Fees; use of, includes Item 214-002, April 13, 1970 which was rescinded. Later a new item came before the Board of its review as item 3-007-RI273. Then finally, an amended policy on Building Fees, Montana University System, which reveals the revision made by the Board on January 16, 1978. The history found at the bottom of this policy demonstrates that the Board of Regents, following the rulemaking process, rescind policies, amend policies, and create new policies, and, they do so in writing, with signatures and dates on which they become effective and showing the date on which they are officially issued.

It seems to be the intention of the Board of Regents in establishing a policy such as Building Fee; Use of, to give students an opportunity to voice their opinion on any building proposal involving student building fees. However, student participation is only advisory in nature and is used to "help assist the Board in making its decision regarding the establishment of a new fee or major construction." ³⁴

There are many such policies that exist in the University of Montana University System Policy and

³⁴ Montana University System Policy and Procedure Manual, Section 940.9.3 Building Fees; Use of, Procedures number 2.

Procedural Manual. Not every mandatory fee has student involvement however. Many of the fees listed below fall into the category of non-student involvement. The list below represent typical types of fees not included as mandatory student fees but nonetheless mandatory fees when a student attempts to use those services.

Section 940.10	Continuing Education Fees
Section 940.12.1	Annual Fee Inventory/Montana University System
Section 940.13.1	Relinquishment of Course Fees; Fully Sponsored Programs
Section 940.14	Residence Hall Rates; Room, Board
Section 940.15	Returned Check Fee
Section 940.16	Non-Resident Summer Session
Section 940.17.1	Educational Service Fee; MPA Program (Helena)
Section 940.17.2	Educational Service Fee; Mamlstrom Higher Education Center
Section 940.18	Course Audit Fee, matriculated students, Montana University System
Section 940.19	Listener Fee, Non-matriculated Students, Montana University System
Section 940.20	Remedial Instruction Fee
Section 940.22	Room reserve Deposit and Refund Schedule

These fees represent mandatory payment if a student expects to register, obtain transcripts or receive a diploma (in respect to Section 940.21 Withholding registration, transcripts, and diplomas from students owing debts (effective date is January 7, 1980 and issued January 25, 1980). It is only mandatory, for instance, if one lives in

a residence hall, then that person is subject to residence hall rates which consist of room, and, or board. ³⁵

Many of these mandatory fees have exceptionally well defined criteria, as found, for example in Section 940.1 Residence Policy. The procedure not only defines who is eligible to be considered a resident of the State of Montana (including requirements defined in Montana state law), but it also includes detailed procedures for hearings and appeals if rulings by the Commissioner of Higher Education are contested.

Other Board of Regent policies are not as well defined as the Residence policy. For example Section 940.11 Motor vehicle registration fees; vehicle parking fees under procedures number 2, states: "The monies received from the fee will be used for the development and improvement of parking lots and to strengthen the University system's security." This is hardly a detailed description for expenditures of motor vehicle revenue. However, it does restrict the expenditures to a general category. These General categories are often expanded and filled in by the presidents of each institution by the creation of their own policies when given the opportunity.

³⁵ All "The funds of the Montana university system and of all the other state institutions of learning, from whatever source accruing, shall forever remain inviolate and sacred to the purpose for which they were dedicated." From Montana Constitution, Article X, Section 10.

To give one illustration in which the Board of Regents expand policy, the president of all of the institutions have created a set of committees associated with the governance of the mandatory student fees automatically assessed at the time of registration. At the University of Montana these include such committees as a Building Fee committee, a Health Service committee, a Housing committee, and a Computer User's Advisory Committee (CUAC).

In the case of Section 940.23 Student Computer Fees, the Board of Regents went so far as to mandate that "Each president shall establish procedures which include a computer user advisory committee made up of a minimum of 25% students to provide for student advice in the use of these funds ."

Student Rights Under the Montana University Teacher's Union

Under the Montana University Teacher's Union Contract of which students are a third party beneficiary, students are also guaranteed representation, but again, only on certain committees. This guaranteed representation is for university committees, which also includes CUAC.³⁶ Students have the right and responsibility of participation in all faculty and/or administration committees, both standing and ad hoc.³⁷ Any student who represents the

³⁶ UTU Contract, section 20.000, number 1, p. 79.

³⁷ UTU contract, section 20.00, number 3, p. 79.

student interest on these committees has full voting powers.

Since the 1972 Constitution of the State of Montana also vests the Board of Regents ³⁸ the full authority to supervise, coordinate manage, and control the Montana University System, what rights do students have when the Board sets policy? The Montana Constitution gives the Board of Regents seemingly full authority to manage the University System.

WHEREAS, Article X, Section 9 of the constitution of the State Of Montana (the "constitution") vests the government and control of the Montana university system in the Board, and expressly grants the Board of Regents the full power, responsibility and authority to supervise, coordinate, manage and control the Montana university system. The procedures that have been established by the Board of Regents since their powers were expanded by the 1972 Montana Constitution, in principle, seem to have a fairly sound system of checks and balances inherent in their decision making process. Students have the right to contest a policy based on the definitions, limits, and authority of the written policy as established by the Board.

Therefore, to demonstrate if students actually have the right to contest a policy based on the definitions, limits, and authority established by the Board through its written policy, a closer examination of a mandatory fee is in order. The discussion will focus on the student computer fee to demonstrate the areas of concern regarding the use of such fees and students' role in such use. This examination will consist of a discussion of the history beginning when the

³⁸ Heretofore the Board of Regents will also be referred as the "Board".

fee was first established, as well as discuss any amendments, or rescissions. The examination will also discuss the impact the student computer fee has had on students and the University of Montana. The examination of the Student Computer User Fee is important because it sets the tone for policy implications relative to specific categories, defines the relationship between the University System, and indicates the need for clearly defined policies and adherence to those policies.

CHAPTER VI

BACKGROUND ON COMPUTER FEES

This chapter addresses the historical background on Student Computer Fees and includes a discussion of university studies on the need for computers on campus, why the student computer fee was targeted for instructional programs meant for students, and the reasons this fee became permanent in 1985. The chapter also goes into some detail about the Board of Regents' issuance of a Special Purpose Revenue Bond meant to alleviate the computer needs of the University System and why student computer fees were pledged against that bond.

Historical Background on Computer Fee

Prior to 1983, the first year a student computer fee was levied, there was already significant concern expressed by faculty and staff about the limited availability of computers (as well as corresponding hardware and software) at the University of Montana. This concern was continually in evidence through the minutes, studies and reports generated from the Computer User Advisory Committee first established in 1972. The 1972 CUAC committee was established to provide advice about general computing needs

for a newly-merged Computer Center at the University of Montana. Before 1972, there had been two Computer Centers. One focused on academic interests while the other focused on administrative concerns.

The Student Computer User Fee initiated July 29, 1983, was intended to relieve student related computer requirements. It was clear that the need for computer hardware and software in all areas, whether administrative, student related, or faculty related, had reached critical proportions. Income from this fee was to be limited "By board policy to purchase or lease computer equipment, software or related items which [would] benefit the instructional program." ³⁹ The policy stated: "Each student enrolled in the regular institutional program (including summer session) at a unit of the Montana University System shall be assessed a computer fee of \$1 per quarter credit (\$1.50 per semester credit hour) up to a maximum of 12 credit hours." ⁴⁰

The established CUAC committee subsequently issued a report November 9, 1983, discussing the usage of these Student Computer Fees. The proposals contained within the report almost exclusively concerned themselves with the

³⁹ Board of Regents Minutes (February 7-8, 1985), Review of the Montana University System Computer Fee Policy and its implementation and use, Fall 1983 through December 1985, p.1.

⁴⁰ Montana University System Policy and Procedures Manual:section 940.23, Computer Fee.

immediate needs for computer hardware and software. At that time there was no guarantee that the recently established computer fee would become permanent. However, the committee did take on the additional task of assessing the academic computing needs on campus as if this fee would allow for long term commitments.

The long range plans (covering the next five years), included funding requests for computing equipment, hardware and software expenditures, as well as estimating costs to convert existing buildings, or building new facilities for computer labs, etc. The committee also noted that personnel costs could be submitted to the Board of Regents for additional funding allocation. Recurring personnel costs were a concern of the CUAC committee because there were no provisions in the Board of Regents policy that covered those expenses. Another reason the 1972 CUAC committee members focused their attention on immediate computer needs was that the Board of Regents had requested the University to "minimize the secondary fiscal effects of purchases made with Student Computer Fee funds until such time as a source of funding for these additional expenses [was] identified. These secondary effects include[d] operations, maintenance, space, training, and supplies."⁴¹ In early 1984, with

42 Discussion Draft: Use of Student Computer Fee: Computer User Advisory Committee (Fall 1983), p. 2. Also see University of Montana Five Year Plan for Computing (May 25, 1984), Summary of contents, pp. 2-6.

revenue generated from Student Computer Fees, the University of Montana purchased the VAX-11/785 mini-computer, VAX 11/750 minicomputer, a MacIntosh Microcomputer laboratory (10 computers), an IBM PC microcomputer laboratory (25 computers) and a microcomputer for the School of Pharmacy (1 computer).

In 1985, in connection with a formal review of Student Computer Fees, the Board of Regents created a permanent Student Computer Fee. From the written discussion found in the Board of Regents February meeting in Helena, certain crucial expansions and restrictions resulted.⁴² The minutes of that meeting verify the depth to which the Board of Regents regarded the original intent for Student Computer Fees. This is reflected in the Board's discussion of whether or not Student Computer Fees would:

1. become permanent
2. be expanded to include maintenance
3. be further expanded for administrative uses, research, or such things as library automation.

Issues one and two were approved. The third issue was not approved. Thus, Student Computer Fees were restricted when the Board of Regents disallowed expansion to administration, library and research. Board policy on the Student Computer Fee are reflected as follows:

⁴² Board of Regents Minutes, (February 7-8, 1985), p.19.

1. The Student Computer Fee was made permanent.
2. The fee monies were expanded to include maintenance. In fact, individual campus computer advisory committees were to determine what amounts to spend for computer purchases, hardware/software purchases, and percentages of fees to be spent on maintaining equipment. However no set amount was designated.⁴³

Moreover, Paul C. Dunham, Director of Research and Services for the Montana University System, on January 19, 1985, reviewed what kind of expenditures drawn from funds generated by Student Computer Fees were appropriate. In this report "The regents established the fee stating that it should not be considered a replacement for general fund support for major computing needs, which should continue to be funded by the legislature."⁴⁴

In spite of the policy statements, abruptly in September of 1985, Student Computer Fees were pledged against a Commissioner of Higher Education Special Purpose Revenue Bond (for which the University of Montana was and

⁴³ Board of Regents Minutes (February 7-8, 1985), p. 19. "Concerned students testified while they recognized the need for maintenance they preferred that only a designated amount be set aside, thus maintaining the original intent for which the computer fee was created."

Then "Commissioner Dayton emphasized that the original intent of the implementation of the fee was to improve student access." p. 18. Also see: Review of the Montana University System Computer Fee Policy and Its Implementation and Use (Fall 1983 through December 1984), pp. 1-9.

⁴⁴ Review of the Montana University System Computer Fee Policy and Its Implementation and Use: (Fall 1983 through December 1984), p. 1.

is, represented as the series B account located in the First Trust Company of Montana.) The Bond was issued for the purpose of making extensive hardware purchase. The Legislative Auditor offered the following brief explanation behind the issuance of the Special Purpose revenue Bond:

In May 1983, Digital Equipment Corporation (DEC) announced plans to discontinue its DECSYSTEM-20 product line and replace it with its VAX line. Both the University of Montana (UofM) and Eastern Montana College (EMC) own DECSYSTEM-20 mainframe computers. Based on DEC's announcement, it became necessary for both units to review computing needs and study potential ways of meeting those needs. ⁴⁵

1984 Special Purpose Revenue Bond

The gross pledged revenue for the Special Purpose Revenue Bond consisted of Student Computer Fees, Land Grant Income, Computer Service Operation Funds, and after 1986, Interest Revenue. As these revenues accrued they were deposited in a separate Plant Fund account.⁴⁶

⁴⁵ Coordination/Compatibility of University System Hardware and Software Acquisitions (January, 1986), Montana Office of the Legislative Auditor. "The announcement did not affect Manana State University (MSU) computing needs as it operates a Honeywell mainframe computer. However, MSU was advised by consultants that current computer equipment hardware was not adequate to meet future needs. Therefore, it also became necessary for MSU to review potential ways of meeting future needs. Accordingly, the university system identified short-term needs and sought funding." p.5. For further information see University of Montana Five Year Plan for computing. (May 25, 1984), p. 24-25, 93.

⁴⁶ Plant Fund accounts are "financial resources allocated to or received by the Montana University System and vocational-technical center for capital outlay purposes or to retire long-term associated with construction or

It is difficult to explain the Board of Regents' intentions in creating a Student Computer Fee and their subsequent actions because little documentation is readily available. However, there is evidence provided by the Legislative Auditor's report that would suggest Computer User Fees were used for other needs than their original purpose. Shortly after the computer fee became permanent, the Board of Regents presented their funding request for computer needs for the university system. This request was presented to the Appropriations Education Subcommittee during the 1985 Legislative session. However, the Subcommittee did not act upon that request. As a result, the Board of Regents issued \$9,090,000 in Special Purpose Revenue Bonds to finance the majority of their computing requests.⁴⁷

Although the bond issuance was intended as a short-term solution for handling the University Systems' overwhelming computer needs, it was recognized that the proceeds of the bond were not adequate "to fully address computing needs over the entire life of the bond."⁴⁸ Because proceeds

acquisition of fixed assets and the net accumulative results of these activities;... " Montana State Code, 17-2-102, p. 707.

⁴⁷ These were seven year bonds which were to mature on December 15, 1992.

⁴⁸ Coordination/Compatibility of University System Hardware and Software Acquisitions (January 1986), Office of the Legislative Auditor, p. 5.

from the bond would fall short of expected computer needs, other sources of funding were to be investigated.

With the portion of revenue allotted to UM from the Special Purpose Revenue Bond, the University of Montana purchased the VAX 8600 systems and application software to replace the DEC-20's. Also purchased, were microcomputers for labs in the Science Complex, Corbin Hall, the Fine Arts building, and the Social Science complex. Also acquired were terminals and communications equipment for the campus, and microcomputers for several departments.⁴⁹

Based on the preliminary report submitted by the Office of the Legislative Auditors in January 1986, the Special Purpose Revenue Bond also enabled the University of Montana to purchase administrative computer packages. The following accounts represent the areas Student Computer Fees are currently found to be disbursed at the University of Montana:

- RC# 5041 Computer Fee Fund
- RC# 5403 CHE Equipment Pool
- RC# 5021 Cuffs Software
- RC# 5022 VAX (Micro) Acquisition
- RC# 5023 Banner (Student Record System)
- RC# 5039 Library Automation
- RC# 1530 Computer Center
- RC# 5432 Bond Issuance
- RC# 5430 Bond Service

⁴⁹ Referenced from Minutes of the 1st Meeting of CUAC (Computer User's Advisory Committee), Wednesday, January 25, 1989, 8:00 a.m., p. 1.

Procurement of these hardware and software purchases from the Special Purpose Revenue Bonds were decided by an "ad hoc" Computer User Advisory Committee created by the Commissioner of Higher Education. This committee consisted of all University System Computer Center Directors.⁵⁰

The Effect on Student Accessibility to Computers By
the Special Purpose Revenue Bond

The effect of placing 100 per cent of the Student Computer Fee as part of the gross pledged revenue against the Special Purpose Revenue Bond is that student computer needs as well as computing needs for instructional programs are not being met.

A University of Montana Laboratory Projection Report conducted Winter 1989, illustrated "a significant increase in demand for the use of microcomputers on campus..." which is continuing to escalate. This was apparent as early as 1983 and was the reason for the creation of the Student Computer User Fee. From 1983 through 1989, computer access for students in microcomputer labs during peak demand times, has steadily become more difficult.

With a high percentage of students requiring the use of microcomputers as part of class assignments, student enrollment projections showing significant increases (recent

⁵⁰ Coordination/Compatibility of University System Hardware and Software Acquisitions (January 1986), Montana Office of the Legislative Auditor, p. 5.

enrollment figures showed an increase of over 800 students in fall quarter, 1989), and a growing familiarity, generally, with microcomputers within the student population, the limited availability for students to readily access computers has become a growing concern.⁵¹

Summary Conclusions on the Development of Student Computer Fees

Based on the evidence offered above, it seems almost meaningless to create advisory committees such as CUAC and request them to repeatedly research and/or review long range planning, and come up with "suggested usage policy for equipment purchased with student fee money,"⁵² The times CUAC has been asked to develop long range plans since the Student Computer Fee was established in 1983 have been many. There is no student computer money available for computer software and hardware needs left for students. This is because of the Board of Regents actions shortly after the Student Computer Fee was made permanent which pledged the

⁵¹ University of Montana Laboratory Projection Report, Winter 1989, "One might assume that during peak demand periods of the quarter, any given hour will be used to its "fullest" potential. The "fullest" potential, in this sense, is not necessarily all of the hours that the lab is open. Presuming the demand is there, it is the synthesis of the lab hours available and the student hours available....The effect of this is that if particular hours are most in demand, the consequences of a full lab during that time will affect a disproportionate number of people." pp. 17-18. For additional discussion see pp. 17-20.

⁵² Board of Regent Policy 940.23.

entire Student Computer Fee (without any student or faculty input) for computer hardware and software needs designed mainly for administrative purposes. It makes the committees' suggestions meaningless as to how Student Computer Fees should be expended. For example, the 1984 CUAC recommendation is reprinted below: Use of equipment purchased with Computer Student Fee money will be restricted to:

1. use which is directly related to a regularly scheduled class.
2. student research which is done for course credit.
3. use related to the maintenance and improvement of the equipment and related software.

The Northwest Association of Schools and Colleges offers further information regarding the computing facilities at the University of Montana. As part of the University of Montana ten year reaccreditation process, the summary reflected the University's computer literacy level, as well as stating the University's weakness in the budget process concerning Student Computer Fee Money. From their evaluation of "Institutional Computing" it states:

The Self Study and the Catalog indicate that computing and data communications are not sufficiently visible on an institutional basis. This is unfortunate in an era when all faculty, staff, students and administrators are, or should be, dependent on computers.

A serious weakness in the budget process is the lack of organizational or committee structure to allow faculty and Deans to participate in planning

for computing on campus. A committee has been used to plan the expenditure of one time student fee money, but has not been active on a continuing basis for planning....The Director reports to the Vice President for Administration and Finance so there has been no organizational process or budget presentation access that involves faculty and academic administrators on a plan and budget for academic computing and data communication needs.⁵³

Moreover, because of limited resources available for the purchase, routine maintenance and repair of equipment, students are currently required to purchase a "punch card" at a cost of \$10.00 per card (for 50 pages) in order to use the laser printer located in the Fine Arts computer lab. The revenue generated from these punch cards is currently used for maintaining the laser printer. This means that students have not only paid for the creation of the computer lab, the computer hardware and software, but are now required to pay additional costs to maintain equipment. Essentially, this \$10.00 represents an additional Student Computer Fee.

Since the Special Purpose Revenue Bond was refunded in 1989, (refinanced), the retirement of the bond has been extended until December, 1993. Students are unlikely to see any improvement or additional computer hardware and software equipment until then. Although most of the \$200,000 that was generated from the refunded bond went to student computer needs, students will be required to pay over

⁵³ Northwest Accreditation Response to the University of Montana, (Summer 1989), p. 16.

\$300,000 in student computer fees to pay for the privilege of using that \$200,000.00.

CHAPTER VII

THE EXTENT TO WHICH THE BOARD OF REGENTS HAS THE AUTHORITY TO SPEND FEES

This chapter concerns itself with the authority of the Board to spend mandatory student fees. Since students are third party beneficiaries to the Board's policy decisions, there is a discussion on the administrative, and legal options available to students. Moreover, the chapter discusses exactly what is meant by "semi-autonomous" in light of established administrative policy.

Students Options When dealing With a Semi-Autonomous Board

The question of whether or not Student Computer Fees are restricted funds is an important issue in light of the way the Board of Regents have chosen to spend these monies. The Board of Regents, plainly speaking, are not using student computer fees for strictly "instructional program" related projects, and are, in fact, using student computer funds for administrative purposes. The remedies available to students facing this situation, and more broadly speaking, the remedies available to students when the Board of Regents chose to interpret their policy differently from what is stated, are limited.

Since students are third party beneficiaries to the Board of Regents policy decisions, the consequences to students in this case are disastrous, because the Board did not follow their own written policy and instead chose to interpret that written policy for other than stated expenditures.

In cases where conflict arises, it has been customary for students to first exhaust administrative remedies, otherwise failure to exhaust administrative remedies might result in the failure for a judicial review.⁵⁴ The purpose for exhausting administrative remedies is that by doing so, a full development of the facts can emerge.⁵⁵ In this case, it also gives the Board of Regents a chance to explain their actions. In this respect, exhausting administrative remedies can make judicial review unnecessary. Moreover, exhausting administrative remedies recognizes the autonomous nature of the Board of Regents to make policies and transact business as they see fit.

In fact, the claim could be made by the Board of Regents that since the 1972 Montana Constitution left all administrative action completely within the domain of the Board of Regents themselves, their policies are not subject

⁵⁴ Black's Law Dictionary, fifth edition, "Judicial Review": Form of appeal from an administrative body to the courts for review of either the findings of fact, law, or of both. See also "appeal," p. 442.

⁵⁵ Gilbert Law Summaries, eleventh edition, (1988), ref. p.126.

to review at all. Since the Board has full power and authority to manage and control the university system, including full power to set any mandatory fee they deem necessary, it would appear that mandatory fees are not reviewable.

However, "agency decisions relating to policy or discretion are frequently set aside by courts upon finding that they are arbitrary,⁵⁶ capricious, or an abuse of discretion⁵⁷...or otherwise not in accordance with the law."⁵⁸ Gilbert's Law Summaries explains that "decisions

⁵⁶ Black's Law Dictionary, abridged fifth edition, (1983), p. 55. Not done according to reason or judgement; depending on the will alone; absolutely in power; capriciously; tyrannical; despotic. Without fair or substantial cause; that is, without cause based upon law, not governed by any fixed rules or standard. Ordinarily, "arbitrary" is synonymous with bad faith or failure to exercise honest judgement and an arbitrary act would be one performed without adequate determination of principle and one not found in the nature of things.

⁵⁷ Black's Law Dictionary, fifth edition, (1984), p. 244. Discretionary acts: Those acts wherein there is no hard and fast rule as to the course of conduct that one must or must not take and, if there is clearly defined rule, such would eliminate discretion. Option open to judges and administrators to act or not as they deem proper or necessary and such acts or refusal to act may not be overturned without showing of abuse of discretion, which means an act or failure to act that no conscientious person acting reasonable could perform or refuse to perform. One which requires exercise on judgment and choice involves what is just and proper under the circumstances.

⁵⁸ Gilbert Law Summaries, eleventh edition, 1988, p. 160.

made at the policy level fall within the discretionary function exception (of review).⁵⁹

The Board of Regents issue interpretive rules (policies) to inform their staff and members of the public on the manner of their actions for managing and controlling the university system. There are factors taken from Gilbert Law Summaries that could determine how much difference a court might give to an interpretation by the Board Regents:

1. Has the Board been consistent in its interpretation of the policy?

The answer to this question is that in spite of the fact that students brought their concern to the Board of Regents concerning the expenditure of n have testified that they believe the 1985 Board of Regent Policy to be in effect, minus any implied amendments.

2. What degree of difficulty is involved in the issue?

The difficulty is that the largest percent of pledged revenue to pay the 9 million dollar Special Purpose Revenue Bond are Student Computer Fees. In order for

⁵⁹ Gilbert's Law Summaries, p. 143.

the Board to adhere to their policy, a redistribution of bond payments would have to occur. At the least this could lead to a refinancing of the Special Purpose Revenue Bond.

3. Has there been sufficient desire to accord the Board of Regents the status of its semi-autonomous nature?

The claim of students is not a challenge of the Board of Regents authority, but, in fact a request that since the Board has the power to set fees, students are asking that the Board uphold their part of the policy by expending these fees for the purpose they were collected. In light of the documentation, and the length of time accorded the Board of Regents to respond, which led students to seek help from the Legislature, all affirm the Board of Regents, semi-autonomous nature.

4. Has the Board allowed public involvement?⁶⁰

The Board, through its established policies and procedures, does allow for public involvement.

⁶⁰ Gilbert Law summaries, ref, p. 159.

However, the Board is not bound by that public involvement.

Since the 1972 Montana Constitution implicitly delegates interpretative power to the Board of Regents, the court cannot substitute its judgment for that of the Boards'. Instead the courts must uphold the Boards policies even if the courts disagree with it. [Chevron, USU v. Natural Resources Defense Council, 467 U.S. 886 (1984)]⁶¹

However, if students can demonstrate that the Board's actions are causing irreparable injury,⁶² and can demonstrate substantial severity and be specific about the type of injury involved, then there can be a review of that administrative policy.

To determine whether or not students can demonstrate that the Board's actions are causing irreparable damage a review of the three original questions presented in the introduction are now in order. This will provide answers about mandatory student fees as designated funds. The second question will determine whether or not the Board is responsible for their management. Finally, the third question will determine whether or not mandatory student

⁶¹ Ibid., p. 158.

⁶² Ibid., p. 126.

fees should be restricted and then abide by the guidelines for such funds.

Question number one: if mandatory fees are not in principle designated funds, then would the policies defining such fees appear to be inconsequential? Policy analysis of student mandatory fees generally, and Student Computer Fees specifically, are in principle, and in fact, designated funds. The policy is consequential because an approved policy has been shown to have the same standing as law. The 1972 Montana Constitution mandated that the Board of Regents have full power and responsibility to manage the University System. Furthermore, once a policy has been approved, the University System is mandated by the constitution to follow those policies. Historically, these policies are considered in force until such time as the Board votes to revise, amend, or rescind that policy.

Question number two: If policies defining such fees are consequential and binding, then is it important to delineate who shall be charged with that responsibility? Analysis of policies relating to student mandatory fees have been shown as the responsibility of the Board. Indeed they have full authority to establish any type of mandatory fee they deem necessary to help manage the university system.

Also the Board has delegated much of the daily management of universities to their prespective presidents. In a May 12, 1989 Missoulain article, "Ruling Out Rumors,"

then President Koch of the University of Montana is quoted as saying, "The function of the regents is to make policy and the function of the president is to administer..." In the state of Montana the Board of Regents consists of seven members and three ex officio members. These members rarely meet more than twelve times a year. Creating and abiding by clearly written policies and procedures is particularly important because of this fact. Without such policies the management of the university system would be seen as seven individuals merely "muddling through." Planning would consist of making judgments on criteria that presented themselves on the spur of the moment.

Question number three: Finally, is the importance of the administration of policy such as the Student Computer fee is rooted in the principles of public administration? Since these fees and their expenditure are public funds it would follow that budgetary norms should be applied.

The Board has developed comprehensive procedures, including grievance procedures. When this policy has been challenged by students; for example, both the Board and the individual claiming in-state residency rely on the wording of the policy. Disagreements arise, yet both the Board and the affected student confine their debate of residency to the limits and definition of that policy.

The degree to which the Board has leeway to interpretation is restricted to state law, and past

interpretations of Board decisions, which are themselves restricted by the courts. However, it is unclear in the case of Student Computer Fees if the Board of Regents can claim to have "implied an amendment"⁶³ to the 1985 policy by approving administrative projects on the Special Purpose Revenue Bond. All five other institutions of higher learning in the state have stated that the 1985 policy to their knowledge was never amended and have restricted their expenditures of Student Computer fees to the original 1985 policy.

⁶³ Response from Commissioner Hutchinson's about how Student computer fees have been expended.

CHAPTER VI

SUMMARY AND CONCLUSIONS

The decision of the Board of Regents pledging 100% of Student Computer Fees has proven disastrous not only to students' accessibility to computers on the UM campus, but has tied revenue up for eight years to pay for computer equipment that became obsolete in five years. Students will have paid approximately 2.4 million dollars for 129 micro-computers and one Vax-mainframe computer. It is true that in 1989 because the Special Purpose Revenue Bond was refunded there was \$200,000 dollars spent for student programming. However, students will pay over \$300,000 in additional payments for that extra year or refinancing.

The UM administration's need for computers has also reached critical proportions in spite of the bulk of Bond projects directed to those needs. This means the university system will pay eight years on administrative computer needs which are themselves obsolete. Currently, the UM administration is considering selling property to pay for better computer equipment.⁶⁴ This new equipment is needed

⁶⁴ The University of Montana sold a portion of property in the Fall of 1990 in order to acquire additional computer hardware for "Banner," an administrative software program.

to help maintain a critical shortage of computer power for administration's purposes.

Based on the recent actions of the Board which ignored student documentation of conflicting policy implementation, and the ensuing effects that implementation has had on the University of Montana, there could be some change in the policy itself that could help satisfy all parties concerned.

The analysis of the Board's actions concerning the expenditure of Student Computer Fees for administrative use is inappropriate. Now that the policy and procedures already set in place by the Board of Regents in respect to mandatory student fees, have been reviewed, it is recommended that the policies already established should be followed. Creating new policy procedures to replace their negative results of the Board's decisions is counter productive, since they did not follow their own policies in the first place. If the policies as approved are followed, this would not only insure participation by all affected participants but would also allow for input, suggestions and recommendations not otherwise available to the Regents.

It is important to be aware that in the case of Regent authority, neither the legislature or the courts can impose judicial restraints. By insisting that the Board is as bound by their policies as the University System though, does create a lawful means to correct educational policy that may have been unwisely interpreted.

Yet "when planning is placed amid continual adjustment to a changing world it becomes hard to distinguish from any other method of decision....Some call this adaptive planning; others call it muddling through. Under the criteria of adaption almost any way of making decisions in a social context can be considered to be 'planning'."⁶⁵

To challenge unclear policy statements by the Board or to challenge the Board's authority to create policy, individuals may also resort to legal recourse or request Attorney General's opinions through the appropriate channels.

Legal recourse, or Attorney General opinions are two approaches for reconciliation open to students if the Board refuses to ignore its' own policies. Either recourse is recommended in light of the Board's decision of September, 1990, which claimed they had implied an amendment to their policy when they had approved the projects on the bond. To imply amendments to written policies, calls all policy into question if it is allowed to go unchallenged.

⁶⁵ Aaron Wildavsky, Speaking Truth to Power/The Art and Craft of Policy Analysis, p. 128.

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